MOTION FILED

SEP 2 5 2002

(6)

No. 01-1867

In The
Supreme Court of the United States

PHILLIP MULDER, *et al.*,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOUNTAIN STATES LEGAL FOUNDATION'S MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF AND *AMICUS* BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF THE PETITIONERS

WILLIAM P. PENDLEY*
**Counsel of Record*
JOSEPH F. BECKER
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021

Attorneys for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

13 pp

MOUNTAIN STATES LEGAL FOUNDATION'S MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF

COMES NOW, Mountain States Legal Foundation ("MSLF") and hereby respectfully moves, pursuant to Supreme Court Rule 37, for leave to the file the accompanying *amicus curiae* brief in support of Petitioners. The Solicitor General of the United States has given his consent to this *amicus* brief. Petitioners have likewise granted consent to MSLF for the filing of this *amicus* brief. However, while waiving its right to file a brief, United Food and Commerical Workers Local 1036, has nevertheless denied consent.

MSLF is a non-profit, public interest legal foundation organized under the laws of the State of Colorado, with its principal place of business in Lakewood, Colorado. MSLF is dedicated to the defense and preservation of individual liberties, the right to own and use property, limited government, and the free enterprise system. Since its inception in 1977, MSLF has been a leader in the battle to preserve the rights guaranteed to persons by the U.S. Constitution. Most recently, MSLF won the landmark equal protection case: *Adarand Constructors, Inc. v. Peña*, 115 S.Ct. 2097 (1995). Specifically, MSLF has developed expertise in interpreting and applying the constitutional protections afforded freedom of speech, religion, and assembly. For example, MSLF was a party in *Mountain States Legal Foundation v. Colorado*, 946 P.2d 586 (Col. App. 1997), and counsel in *Montana Chamber of Commerce v. Argenbright*, 226 F.3d 1049 (9th Cir. 2000). MSLF believes that its expertise on the guarantees of the Constitution regarding First Amendment freedoms will assist this Court.

Although this is a case rooted in labor law, constitutional protections of free assembly (or association), ignored for much of the previous century in relation to that area of law, remain vitally important, are at stake in this case, and warrant protection by this Court.

WHEREFORE, MSLF respectfully moves for leave to participate in this case as *amicus curiae* and to file the accompany *amicus curiae* brief.

DATED this 25th day of September, 2002.

Respectfully submitted by:

JOSEPH F. BECKER, ESQ.
WILLIAM PERRY PENDLEY, ESQ.
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, CO 80227
(303) 292-2021

Attorneys for Amicus Curiae
Mountain States Legal Foundation

TABLE OF CONTENTS

	Page
IDENTITY AND INTEREST OF *AMICUS CURIAE* ...	1
REASON FOR GRANTING *CERTIORARI*	2
THE FIRST AMENDMENT PROHIBITS USE OF COMPULSORY UNION DUES FOR UNION ORGANIZING	2
A. The History of Unionization Moved Government's Role From One Unconstitutional and Untenable Extreme to Another and Also Provides a Framework For Considering the Case at Bar.	3
B. The NLRB Has Ignored This Court's Rulings on This Question.....	5
CONCLUSION.....	8

TABLE OF AUTHORITIES

Page

CASES:

Boy Scouts of America v. Dale, 530 U.S. 640 (2000).....3, 5

Chicago Teachers Union v. Hudson, 475 U.S. 292 (1985)..... 6

CWA v. Beck, 487 U.S. 735 (1988).....2, 6, 8

Ellis v. Brac, 466 U.S. 435 (1984).....2, 6, 8

Montana Chamber of Commerce v. Argenbright, 226 F.3d 1049 (9th Cir. 2000)..... 1

Mountain States Legal Foundation v. Colorado, 946 P.2d 586 (Col. App. 1997) 1

The First American Labor Case, 41 Yale L.J. 165 (1931)..... 3

MISCELLANEOUS:

National Labor Relations Act, 29 U.S.C. § 151 4

National Labor Relations Act, 29 U.S.C. § 158(d)..... 4

U.S. Const. amend. I.....2, 3, 4, 7

Thomas Jefferson, Statute of Religious Freedom (1779)..... 2

THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW, RANDY E. BARNETT (Oxford: Clarendon Press 1998)..... 3

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF THE PETITIONER[1]

Mountain States Legal Foundation ("MSLF") respectfully submits this *amicus curiae* brief in support of Petitioners, Phillip Mulder, *et al.*

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Mountain States Legal Foundation is a nonprofit, public interest legal foundation organized under the laws of the State of Colorado, with its principal place of business in Lakewood, Colorado. MSLF has been a leader in litigation to preserve the rights guaranteed by the U.S. Constitution. Specifically, MSLF has developed expertise in interpreting and applying the constitutional protections afforded freedom of speech, religion, and assembly. For example, MSLF was a party in *Mountain States Legal Foundation v. Colorado*, 946 P.2d 586 (Col. App. 1997), and counsel in *Montana Chamber of Commerce v. Argenbright*, 226 F.3d 1049 (9th Cir. 2000). MSLF believes that its expertise on the guarantees of the Constitution regarding First Amendment freedoms will assist this Court.

Although this is a case rooted in labor law, constitutional protections of free assembly (or association), ignored for much of the previous century in relation to that area of

[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel, made a monetary contribution to the preparation and submission of this brief.

law, remain vitally important, are at stake in this case, and warrant protection by this Court.

REASON FOR GRANTING *CERTIORARI*

The Court should grant *certiorari* to protect an important, albeit small, remnant of the First Amendment protection afforded the fundamental freedom of association as it relates to the National Labor Relations Act and to protect conclusively its holdings in *CWA v. Beck*, 487 U.S. 735 (1988), and *Ellis v. Brac*, 466 U.S. 435 (1984), namely, that union organizing costs are not chargeable to objecting non-members. The Court should also grant *certiorari* to preserve the principle that federal administrative agencies serve at the behest of Congress and are not free to "duck, bob, and weave" to avoid unanimous Supreme Court interpretations of congressional Acts.

THE FIRST AMENDMENT PROHIBITS USE OF COMPULSORY UNION DUES FOR UNION ORGANIZING

In 1779, Thomas Jefferson wrote, "To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical."[2] Jefferson's notion is protected in the language of the First Amendment to the U.S. Constitution; that is, "Congress shall make no law . . . abridging . . . the right of

[2] Thomas Jefferson, Statute of Religious Freedom (1779).

people peaceably to assemble,"[3] which, of course, includes the "[f]reedom not to associate."[4]

A. The History of Unionization Moved Government's Role From One Unconstitutional and Untenable Extreme to Another and Also Provides a Framework For Considering the Case at Bar.

An examination of the history of unionization provides not only a useful framework for the Court's analysis in this case but a classic example of government replacing one untenable and unconstitutional position with another, not an altogether uncommon occurrence amidst an activist political climate rather than one in which the government is restrained to its proper role of merely guaranteeing a system of negative rights.[5]

As Nelles writes in *The First American Labor Case*, 41 Yale L.J. 165 (1931) (discussing *Commonwealth v. Pullis*, Philadelphia Mayor's Court (1806)), the typical governmental response to those attempting to form employee associations was the filing of criminal conspiracy charges. However, just as individuals have the right to pursue happiness through voluntary exchange (freedom of contract, *inter alia*), so too do laborers have the right to enter agreements between themselves to secure said happiness

---

[3] U.S. Const. amend. I.

[4] *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000).

[5] *See generally*, THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW, RANDY E. BARNETT (Oxford: Clarendon Press 1998).

jointly. For governments to punish members of such associations with criminal conspiracy sanctions clearly violates the First Amendment right of assembly and the entire notion of freedom of contract. To hold those so doing as criminal conspirators is the philosophical equivalent of incarcerating those capitalists pooling their justly acquired money to invest in capital goods for which none of the individual investors could, absent this pooling, obtain such a good.

However, in creating the National Labor Relations Board (NLRB) through the National Labor Relations Act (NLRA),[6] rather than merely restoring itself to the proper governmental role – that is, enforcing the "negative" right of non-interference with employees' ability to be free of criminal sanctions in their attempts to strengthen their bargaining power by doing so as a unit – the NLRA instead fostered a regime under which "positive" rights were granted to members of the collective, more "rights," in fact, than any individual laborers held *ex ante*. In other words, special "group" rights were bestowed upon individuals simply based on their status as members of a labor union. The positive right or "duty to bargain,"[7] irrespective of a business owner's interest or willingness in so doing, provides an adequate example. This "duty" to bargain could be likened to a group of supermarket customers who, unhappy with the price of ketchup and simply because of their status as an organized consumer group, could forcibly require the grocer to associate (*i.e.*, sit and negotiate)

---

[6] National Labor Relations Act, 29 U.S.C. § 151.

[7] National Labor Relations Act, 29 U.S.C. § 158(d).

over the price of ketchup rather than to spend his productive time doing what grocers otherwise would do. Fortunately for the grocery store owner, at least with respect to his customers, "[f]reedom of association . . . plainly presupposes a freedom not to associate." *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000).

Although this case is about grocery store employees and "their" unions, it is decidedly not about ketchup or the NLRA-imposed duty to bargain. It is, however, about the illegitimacy of at least one of the positive group rights "bestowed" by the NLRA and the abrogation of certain employee's negative rights not to associate. Analysis of the present issue within the context of government's proper role as guarantor of negative rights would at least provide the Court with a philosophical sense of direction as it attempts to answer the narrower question presented by this case. The Court should avoid the temptation to move further in the wrong direction and impose a duty on those objecting non-members who, because of some prior illegitimate interference by government through the NLRA, find themselves lacking of constitutionally guaranteed protections.

B. The NLRB Has Ignored This Court's Rulings on This Question.

The narrower question before this Court is whether union organizing activities are chargeable to objecting non-members whose fundamental constitutional rights of non-association have been denied them based on some employee election in an NLRA-sanctioned voting scheme.

The imposition of any monetary charges upon those subject to the deprivation of their constitutional rights

rests upon the flawed notion that absent the mandatory payment of dues, "[N]onmembers receive . . . benefits of the Union's representation without making any financial contribution to its cost." *See, e.g., Chicago Teachers Union v. Hudson*, 475 U.S. 292, 294 (1985). In *Chicago Teachers*, the union attempts to justify the imposition of dues as "an attempt to solve this 'free rider' problem." *Id.* Of course, even this justification is based on the flawed assumption that objecting non-members (who may well be of exemplary merit or character) would be unable to negotiate a better compensation package for themselves than that the union negotiates for its average laborer. Thus, in addition to being denied this right to pursue happiness free of governmental interference (freedom of contract, *inter alia*), they must now associate with, by paying, the very organization that, with the assistance of the NLRB, has been complicit with government in denying this fundamental right.

But here, while constitutionally and fully justified in arguing to protect the entirety of the objecting non-member's involuntary "contributions," Petitioners seek only to protect that fraction of the "contribution" that the union would use for activity related to recruiting activities. On the question of whether the union has a legitimate claim to this portion of the objecting non-member's "contribution," this Court has resoundingly answered that question in the negative in both *CWA v. Beck,* 487 U.S. 735, 745-46 (1988), and *Ellis v. Brac*, 466 U.S. 435, 451-53 (1984). Yet, the NLRB apparently has engaged in "selective hearing" on this point.

Indeed, the NLRB argues that recruiting new union members increases the union's service to the non-union member on whose behalf it claims to be negotiating and,

thus, this objecting non-member should be forced to pay. Even if the union's argument were true, the Petitioners' First Amendment right not to associate should defeat the union's claim on the objecting non-member's hard-earned wages.

But again, the pro-union argument fails to acknowledge that the objecting non-member sees union representation, even in its role simply as a contract negotiator, as an economic evil. If the objecting non-member believed he was well-served by the union, he would contribute to it willingly. The objector's subjective and perfectly rational view may well be that he could negotiate a more lucrative employment agreement for himself because of his individual merit or simply one more suitable to his own individual needs (*i.e.*, reduced hours, better health insurance, and so forth), irrespective of the total outlay by the employer for salary and benefits. Unfortunately, this objector is instead denied his right to pursue his individual best interest and his right to free association because of some majority union-selection election fostered under the NLRA.

Even if, *arguendo*, some benefit to the objector could be found, it is impossible to separate a union's recruiting activities from its political activities because, at a minimum, more members result in more contributions that may be used ultimately for political ends. Thus, even if an increase in membership raises wages, the increase in wages may not offset the negative effects, for that objecting non-member, of the increased union political activity with which he or she most vehemently condemns. To the

extent that this is not the case, the objector is free to contribute to these activities voluntarily.

CONCLUSION

Given the controlling authority of *CWA v. Beck* and *Ellis v. Brac* and the indistinguishability between union-enhancing political actions and other union power enhancing efforts and given the illegitimacy of those positive and group "rights" granted by passage of the NLRA in the first place, the Court must, at a minimum, grant *certiorari* to limit forced union "contributions" to those strictly attributable to the costs of bargaining undertaken by the union in the particular objecting non-member's interest and, at the same time, to question seriously the very legitimacy of forcing an objector to associate against his will and to pay for a negotiating service in which he has no genuine interest in participating.

Respectfully submitted,

WILLIAM P. PENDLEY*
**Counsel of Record*
JOSEPH F. BECKER
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021

Attorneys for Amicus Curiae

Dated: September 25, 2002